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Supreme Court, U.S.
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MICHAEL J. KOLBECK,

Petitioner

v.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE THIRD CIRCUIT COURT'S REFUSAL TO ALLOW PETITIONER TO SUGGEST *IN BANC* RECONSIDERATION OF A DENIED REQUEST FOR EXTENSION OF TIME TO FILE FOR REHEARING BY THE THIRD CIRCUIT COURT OF APPEALS CONSTITUTES A DEPRIVATION OF PETITIONER'S DUE PROCESS RIGHTS.

WHETHER DENIAL OF PETITIONER'S PETITION REQUESTING AN EXTENSION OF TIME TO FILE FOR REHEARING AND DENIAL OF APPELLANT'S PETITION TO RECALL THE MANDATE ISSUED BY THE THIRD CIRCUIT COURT OF APPEALS WERE VIOLATIONS OF PETITIONER'S DUE PROCESS RIGHTS.

Pursuant to Supreme Court Rule 14.1(b) all parties involved herein are listed in the caption of this Petition and, pursuant to Rule 29.1, there is no parent company or subsidiary involved in this Petition.

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MICHAEL J. KOLBECK,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

Kolbeck v. General Motors Corp., 745 F.Supp. 288 (E.D.Pa. 1990), *aff'd*, 950 F.2d 722 (3rd Cir. 1991) (table). [A-12]

STATEMENT OF JURISDICTION

The Decrees at issue herein were entered by the Third Circuit Court of Appeals on April 20, 1992; April 20, 1992; and June 11, 1992. Although appellant filed a Petition for Rehearing In Banc of the court's denial of an extension of time to apply for rehearing with the Third Circuit Court of Appeals on April 27, 1992, the Petition was treated by the Circuit Court Clerk as a Motion for Reconsideration. As unilaterally re-designated by the Clerk, Petitioner's Motion for Reconsideration was considered by the original Third Circuit Appeal Panel of

three judges which resulted in the Decree set forth above and dated as June 11, 1992.

Jurisdiction to review the Decrees at issue is authorized by 28 U.S.C. §1254.

The following constitutional provisions, statutes and rules of court are involved in this case:

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

4. 28 U.S.C. §46(c) provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

5. 28 U.S.C. §452 provides

> All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.
>
> The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding.

6. Internal Operating Procedure 10.3.3 of the Third Circuit Court of Appeals provides:

> A motion for reconsideration or rehearing of any SMP (Standing Motion Panel) decision, other than a case dispositive ruling, is referred only to that SMP and not to the court in banc,

unless a majority of the SMP refers it to the court in banc. A petition for rehearing of a case dispositive ruling is referred to the court in banc according to the procedures for petitions for rehearing.

7. Federal Rule of Appellate procedure 26(b) provides:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Federal Rule of Appellate Procedure 40(a) provides:

> "A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is

granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

STATEMENT OF THE CASE

This petition arises from a diversity case involving products liability claims based on Pennsylvania law. The underlying case arises out of an October 1985 automobile accident in which petitioner Michael Kolbeck suffered spinal cord damage and was permanently paralyzed from the neck down. At the time of the accident, Mr. Kolbeck was a front-seat passenger in a Pontiac Grand Prix designed and built by defendant-appellee General Motors Corporation. He alleges that he suffered his spinal cord injury when his head struck the rear-view mirror assembly in the GM-built vehicle, and the mirror remained locked in its windshield mounting instead of breaking away on impact as it was designed to do. He contended that the rear-view mirror assembly was defective in design and manufacture, and he brought suit against General Motors on negligence and strict liability theories.

Mr. Kolbeck filed suit in the Court of Common Pleas of Philadelphia County, Pennsylvania, in September 1987. General Motors removed the case to the U.S. District Court for the Eastern District of Pennsylvania in January 1988. The case was tried in the District Court before the Honorable Daniel H. Huyett, III, and a jury, from March 19, 1991, through April 16, 1991, resulting in a verdict and judgment in favor of General Motors. In answers to special interrogatories setting forth its verdict, the jury found that General Motors had been negligent in designing and manufacturing the mirror assembly in question, and it found the mirror assembly was defective in design and manufacture. However, the

jury also found that neither General Motors' negligence, nor its defective rear-view mirror assembly, was the proximate cause of Mr. Kolbeck's injury.

Mr. Kolbeck appealed from the judgment entered on the jury's findings, and sought a new trial. His appeal was based on several trial court rulings. The only trial court ruling appealed to the Third Circuit that is of consequence herein dealt with the trial court's decision that General Motors could present a "seat belt defense" to Mr. Kolbeck's negligence and strict liability claims. Prior to trial, the District Court had issued an interlocutory opinion explaining its ruling to allow the seat belt defense. *Kolbeck v. General Motors Corp.*, 745 F.Supp. 288 (E.D.Pa. 1990) [A-12]. Based upon this erroneous decision, the court instructed the jury to consider the fact that Mr. Kolbeck was not wearing a seat belt at the time of the accident in question to determine whether he was contributorily negligent, and also to determine whether any defect in the mirror assembly he struck proximately caused his injury. On appeal, Mr. Kolbeck contended that the seat belt defense should not have been allowed under Pennsylvania law and that the jury's verdict was *directly* attributable to the Court's erroneous allowance of the seat belt defense.

On November 27, 1991, without the benefit of oral argument, a panel of the Third Circuit entered a Judgment Order, affirming without opinion the judgment entered by the District Court. The circuit court's mandate issued on December 19, 1991. [A-1] Absent any indication of the bases for the panel's affirmance, and with the realization that petitioner had brought to the panel's attention all of the relevant state law, and relevant Third Circuit decisions pertinent to the issues on appeal – including the erroneous admission of evidence of non-seat belt use in connection with his product defect claim – the plaintiff did not file for rehearing or seek further appellate review. Consequently, the Mandate was issued on December 19, 1991 in this appeal.

Thereafter, on March 10, 1992, portions of an Opinion of another Third Circuit panel in the case of *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430 (3rd Cir. 1992), were published – and made known for the first time to petitioner – in the local legal newspaper, the Philadelphia Legal Intelligencer. The *Dillinger* case, argued before the Third Circuit on December 12, 1991 with an opinion filed on February 25, 1992, and rehearing *in banc* denied on April 1, 1992, [A-3] specifically held that the decision of the trial court in *Kolbeck* was in error in admitting evidence of the plaintiff's non-use of his seat belt in connection with plaintiff's product defect claim. Speaking for the Court, Judge Greenberg stated:

> In our view, the district court in *Kolbeck* mistakenly relied on Pennsylvania appellate decisions in negligence rather than products liability actions. . . .
>
> * * * *
>
> In light of the foregoing decisions, and setting aside *Kolbeck* which we will not follow, we are satisfied that the district court in this case erred in admitting evidence of Dillinger's non-use of the seat belt, even for the limited purpose of mitigating damages.

Dillinger, *supra*, 959 F.2d at 439-40. [A-35]

While the *Dillinger* court considered the erroneous admission of the seat belt defense harmless – because the jury did *not* find the product defective – the exact opposite finding was made by the jury in the instant case. The decision in *Dillinger* adopted plaintiff Kolbeck's arguments raised in both the trial court and before the Third Circuit. That is, the non-use of a seat belt *cannot* be offered in defense of a products liability claim to either defeat the defect claim or to mitigate against damages. The *exact* cases cited in *Dillinger* to support these conclusions were cited by Petitioner in the briefs filed before, during and after trial.

The same day counsel discovered the existence of *Dillinger*, he acquired a copy of the opinion and, on

March 11, 1992, petitioner filed a Petition for Extension of Time for Rehearing. Petitioner's request for an extension of time was initially referred to one judge from the same panel that had previously affirmed the trial court. On April 2, 1992, the Honorable A. Leon Higginbotham, Jr. granted the Petition Requesting an Extension of Time without prejudice for the panel to decide if the petition was untimely under the circumstances. [A-5] Based upon Judge Higginbotham's Order, Petitioner filed a Petition to Recall the Mandate. Again, the Petition to Recall the Mandate was assigned to the original merits panel.

In the interim, on April 1, 1992, the Third Circuit Court in the *Dillinger* case denied the defendant's request for rehearing or argument by the Court *In Banc*. Subsequently, on April 20, 1992, in connection with the instant Petition the original merits panel reexamined Judge Higginbotham's April 2, 1992 Order and denied petitioner's request for an extension of time. [A-6] Likewise, on April 20, 1992, the Petition to Recall The Mandate was denied by the original merits panel. [A-7]

In an attempt to obtain review of petitioner's position by a full complement of the Third Circuit's active judges, a Petition for Rehearing *In Banc* was filed on April 27, 1992. By way of correspondence date April 28, 1992, the Third Circuit Court's Clerk advised that Petitioner's request for Rehearing *In Banc* would not be treated as such; rather, the clerk stated that the request would be re-submitted to the same panel and treated as a Motion for Reconsideration. [A-8] On June 11, 1992, the original merits panel denied (what the clerk and court characterized) petitioner's request for reconsideration; the court has never addressed Petitioner's suggestion for *in banc* review. [A-10]

ARGUMENT

I. THE THIRD CIRCUIT COURT'S REFUSAL TO PERMIT PETITIONER TO SUGGEST THE NEED FOR *IN BANC* CONSIDERATION CONSTITUTES A DENIAL OF PROCEDURAL DUE PROCESS

The Third Circuit Court of Appeals, acting through its clerk, has refused to permit Petitioner to suggest that appropriate circumstances exist warranting submission of his request for an extension of time to file for a rehearing to an *in banc* session of the court. Based on existing precedent of this Court, it is Petitioner's contention that the circuit court's actions have deprived him of procedural due process. Consistent with this Court's supervisory powers and in order to preserve Petitioner's rights, it is requested that this Petition for a Writ of Certiorari to the Third Circuit Court of Appeals be granted.

In *Mathews v. Eldridge*, 424 U.S. 319, __, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, __(1976), this Court enunciated the following test for application in claims alleging procedural due process denials:

> . . . our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, *supra*, 96 S.Ct. at 903, *citing*, *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S.Ct. 1011, 1018-22, 25 L.Ed.2d 287 (1970). In *Lassiter v. Department of Social*

Services of Durham County, 452 U.S. 18, __, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981), *reh'g den.* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed. 1023, a case involving an indigent petitioner, this Court held that the three factors test laid out in *Mathews*, *supra*, would apply to a determination of whether a state trial court had denied the petitioner her procedural due process rights by refusing to appoint counsel in a proceeding to terminate her parental rights. Consequently, the *Mathews* test has been deemed applicable where, as here, a claim of a procedural due process denial has been premised upon an alleged denial of court access. Instantly, an analysis of the *Mathews* factors leads to the conclusion that the Third Circuit Court's refusal to consider Petitioner's suggestion for rehearing *in banc* was a denial of due process.

A. Petitioner Has a Constitutionally Protected Property Interest in The Instant Matter.

The protections of due process apply only when an individual is in danger of being deprived of his constitutionally protected rights. *See*, *Mathews*, *supra*; *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). It is Petitioner's contention that his constitutional right of meaningful access to the courts, which is grounded in the First and Seventh Amendments to the United States Constitution, has been deprived by application of the Third Circuit Court's procedural rule denying him an opportunity to suggest rehearing *in banc*.

The First and Seventh Amendments to the United States Constitution provide respectively:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, **and to petition the Government for a redress of grievances.**

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

According to this Court, denial of "access to the courts" may be a deprivation of life, liberty , or property, without due process of law. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Furthermore, the right of access to the courts must be "adequate, effective and meaningful . . . ." *Bounds v. Smith*, *supra*, 430 U.S. at 822. Although the *Bounds* case was decided in the context of a prisoner's right to access the courts, the principles espoused therein can be no less applicable herein. Therefore, the essential inquiry is what constitutes "adequate, effective and meaningful access" in any given context. Stated otherwise, it must be determined what minimum procedures shall be afforded in order to satisfy the dictates of the Due Process Clause.

B. The Third Circuit Court's Interest in the Administration of Its Court System Does Not Outweigh The Probability For Erroneous Decisions in the Application of Internal Operating Procedure 10.3.3.

Once it is determined that the Due Process Clause is applicable to a particular case, the only question remaining is what process is due. *Morrissey v. Brewer*, 408

U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). "For all its consequences, 'due process' has never been, and perhaps can never be, precisely defined." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, __, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981), *reh'g den.* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed. 1023. In fact, our idea of due process is, "perhaps, the least frozen concept of our law." *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956) (opinion concurring in judgment). As this Court has held:

> . . . the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake..

Lassiter, *supra*, 101 S.Ct. at 2158.

Analysis of Petitioner's claim is complicated as, "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, *supra*, 408 U.S. at 481. Likewise, this Court's decisions "establish that 'due process' is a flexible concept – that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, __, 105 S.Ct. 3180, 3189, 87 L.Ed.2d 220, __(1985), *quoting*, *Mathews*, *supra*, 424 U.S. at 334; *Morrissey*, *supra*, 408 U.S. at 481. Consequently, "[d]ue

process, as this Court often has said, is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, __, 110 S.Ct. 975, 984, 108 L.Ed.2d 100, __(1990).

Instantly, Petitioner contends that application of Third Circuit Internal Operating Procedure 10.3.3 has resulted in a denial of his right of meaningful access to the courts. In this regard, it is significant that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time **and in a meaningful manner**.'" *Mathews v. Eldridge*, *supra*, 424 U.S. at 319 (emphasis added), *quoting*, *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). *See also*, *Union of Concerned Scientists v. Atomic Energy Comm.*, 499 F.2d 1069, 1081 (D.C. Cir. 1974); *Armstrong v. Manzo*, *supra*, 380 U.S. at 552; *Goldberg v. Kelly*, *supra*, 397 U.S. at 267; *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914).

Although the Third Circuit Court may adopt and implement rules and regulations necessary to the orderly administration of its business, no such rule or regulation should, by its application, deprive any individual of his or her due process rights. One function of this Court is to guarantee that no circuit court departs from or sanctions a departure from the accepted and usual course of judicial proceedings. *See*, Supreme Court Rule 10. This must be particularly true, where, as here, such a departure deprives an individual of his constitutionally protected right of meaningful access to the courts. Therefore, while the circuit courts may adopt their own procedures to determine when *in banc* consideration is warranted, this Court is empowered to oversee the actions of the various circuit courts to ensure that this power is being exercised properly. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953).

Third Circuit Court of Appeal's Internal Operating Procedure 10.3.3 provides:

> A motion for reconsideration or rehearing of any SMP (Standing Motion Panel) decision, other than a case dispositive ruling, is referred only to that SMP and not to the court in banc, unless a majority of the SMP refers it to the court in banc. A petition for rehearing of a case dispositive ruling is referred to the court in banc according to the procedures for petitions for rehearing.

Internal Operating Procedure 10.3.3 is derived from 28 U.S.C. §46(c) which provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

This Court has had several opportunities to examine the requirements of §46(c) and has discussed the types of circumstances that warrant *in banc* consideration. Generally speaking:

> The *en banc* power, confirmed by §46(c), is, as we emphasized in the Textile Mills case, a necessary and useful power — indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate. If §46(c) is to achieve its fundamental purpose,

> certain fundamental requirements should be observed by the Courts of Appeals. In the exercise of our "general power to supervise the administration of justice in the federal courts," the responsibility lies with this Court to define these requirements and insure their observance.

Western Pac. R. Corp. v. Western Pac. R. Co., *supra*, 73 S.Ct. at 62-63 (footnotes omitted). The most fundamental requirement underlying §46(c) is that litigants have the unfettered opportunity to **suggest** that a circuit court consider a matter *in banc*. The right to suggest that *in banc* consideration is appropriate has been confirmed by this Court:

> It is also essential that litigants be left free to suggest to the court, or to the division – depending upon where the power of initiation resides, as determined by the active circuit judges of the court – that a particular case is appropriate for consideration by all the judges. A court may take steps necessary to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately. Counsel are often well equipped to point up special circumstances and important implications calling for *en banc* consideration of the cases which they ask the court to decide. If, in the exercise of its discretion under §46(c), a court denies litigants the privilege of reaching the ear of every circuit judge on the *en banc* question, there is still no reason to deny them access to the few circuit judges who must act initially, and perhaps decisively, on the matter for others. Counsel's suggestion need not require any formal action by the Court; it need not be treated as a motion; it is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing *en banc*.

Western Pac., *supra*, 73 S.Ct. at 663 (footnotes omitted).

Third Circuit Court Internal Operating Procedure 10.3.3 which denies litigants such as Petitioner the opportunity to **suggest** that *in banc* consideration of a panel's decision may be appropriate, is fundamentally flawed and constitutes a denial of due process. This conclusion has further support in the Court's *Western Pacific* opinion:

> We hold that the statute does not compel the court to adopt any particular procedure governing the exercise of the power; but whatever the procedure which is adopted, it should be clearly explained, so that members of the court and litigants in the court may become thoroughly familiar with it; and further, **whatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc*, that his case is an appropriate one for the exercise of the power.**

Western Pac., *supra*, 73 S.Ct. at 666 (emphasis added). Having determined that litigants must be afforded the opportunity to **suggest** *in banc* consideration, this Court next examined under what circumstances such consideration would be appropriate:

* * * *

> That this Court has deemed the *en banc* power to be an important and useful device in the administration of justice in the courts of appeals is apparent from our action in *United States ex rel. Robinson v. Johnston*, 1942, 316 U.S. 649, 62 S.Ct. 1301, 86 L.Ed. 1732, and *Civil Aeronautics Board v. American Air Transport Inc.*, 1952, 344 U.S. 4, 73 S.Ct. 2 (1952). In the *Robinson* case, *supra*, where it appeared that a "conflict of views" had arisen "among the judges of the Ninth Circuit", we remanded the case "for further proceedings, including leave to

> petitioner to apply for a hearing before the court *en banc*." 316 U.S. 649, 650, 62 S.Ct. 1301.
>
> * * * *

Western Pac., *supra*, 73 S.Ct. at 662 n. 20. The appropriateness of granting *in banc* consideration where an intra-circuit conflict exists was reinforced in this Court's per curiam opinion in the case of *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974). The *Moody* Court opined that "the *in banc* court is normally reserved for questions of exceptional importance, or **to secure or maintain uniformity of decision within the circuit.**" *Moody*, *supra*, 94 S.Ct. at 2516 (emphasis added).

In his concurring opinion in the *Western Pacific* case, Mr. Justice Frankfurter provided a poignant explication of the dominant basis justifying *in banc* consideration by the circuit courts:

> Rehearings *en banc* by these courts, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations *en banc* are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings *en banc* may be a resort also in cases extraordinary in scale – either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit. Any procedure devised by a court of appeals which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts may be adopted agreeably with §46(c).

Western Pac., *supra*, 73 S.Ct. at 668. Justice Frankfurter took strong issue with the contention that determination for *in banc* consideration by the original circuit

court panel considering the matter (the procedure followed in the instant case) would satisfy the goals of §46(c):

> There may be – there doubtless are – other ways in which a court of appeals, acting *sua sponte*, may accomplish all that needs to be accomplished in the exercise of the discretionary power to sit *en banc*. But I do not see how any procedure can do so whose effect is not to apprise all active judges either of all decisions of panels of the Court, or of those decisions which counsel bring to the Court's attention, by motion or suggestion . . . as raising the problems at which the grant of power in §46(c) is directed. For this reason I do not believe that a delegation of authority to the panel which heard the case to dispose finally, in behalf of the entire court, of petitions for rehearing *en banc* – if there are to be such petitions and if through them alone §46(c) is to be implemented – would constitute adoption of permissible procedure for the exercise of the power conferred by §46(c). It may be proper to require petitions for rehearing *en banc* to be made to the panel in the first instance, but to allow the discretionary function under §46(c) to be discharged definitively by the panel whose judgment may call for *en banc* action is to treat the statute as an empty, purposeless form of words.

Western Pac., *supra*, 73 S.Ct. at 668-69. Clearly, the procedure at issue fails to prevent the very problem which §46(c) was intended to remedy. Even Justice Jackson, in a dissenting opinion, addressed the need for *in banc* consideration to resolve the very type of intracircuit conflict present herein when he stated:

> . . . . **In cases of intracircuit conflict** or other exceptional situations **which actually demand the attention of the full court**, the judges of a court should be trusted to convene on their own initiative.

Western Pac., *supra*, 73 S.Ct. at 669 (footnote omitted) (emphasis added).

At one time, the Third Circuit Court's process for considering requests for rehearing *in banc* was explicitly approved by this Court in the case of *Shenker v. Baltimore and Ohio Railroad Co.*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709 (1963). However, the Third Circuit's procedure has changed since the Court's opinion in *Shenker*. Specifically, the Third Circuit's prior practice entailed uniform submission of all petitions for rehearing and rehearing *in banc* to all active circuit court judges. Unlike the prior practice, the Third Circuit has now created a distinction between merit and motion panel decisions and has attributed significance to the case dispositive nature of motion panel decisions in determining whether a litigant may suggest *in banc* consideration.

This Court has held that the ability of a litigant to suggest that there are circumstances warranting *in banc* consideration of a particular matter is not subject to interference. There is no dispute that the motion panel's decision herein was case dispositive as it effectively precluded any further review in the Third Circuit. As pointed out, the motion panel in this case was composed of the same circuit judges who originally considered the merits of petitioner's appeal. In fact, none of the issues raised below have ever been considered by any Third Circuit Judge other than the three original merit panel judges. This has occurred despite petitioner's request for rehearing *in banc* and the obvious conflict between circuit court panels.

Although Third Circuit Operating Procedure 10.3.3 provides for *sua sponte* referral for *in banc* consideration by the original panel of judges, the circumstances of this case demonstrate rather clearly that original panel judges cannot always be entrusted with the responsibility to bring appropriate cases before the entire court for review. Specifically, shortly before Petitioner filed his request for rehearing of the Order denying an extension

of time for rehearing, all active judges of the Third Circuit voted on a Petition for Rehearing *In Banc* that had been filed in the *Dillinger* case. The request for rehearing *in banc* in *Dillinger* was denied on April 1, 1992. One logical conclusion to be drawn from the refusal of the Third Circuit Court to rehear *Dillinger in banc* is that the majority of active judges on the Third Circuit Court agreed that the District Court in *Kolbeck* erred in submitting evidence of plaintiff's seatbelt use in his products liability case and, that *Dillinger* was consistent with Third Circuit precedent.

Yet, aware of the denial for rehearing *in banc* in *Dillinger*, and confronted with Petitioner's request for rehearing, the instant circuit court panel not only refused to consider Petitioner's request as one for *in banc* consideration, but also neglected to *sua sponte* refer the matter for such consideration. The panel at issue denied Petitioner's request despite its undeniable knowledge of the blatant inconsistency between its original affirmance of the *Kolbeck* trial court and the panel decision in *Dillinger* which explicitly rejected the *Kolbeck* trial court's erroneous ruling on the seat belt issue. Although, as discussed below, the circuit court had the authority to recall its mandate to prevent the substantial injustice which has resulted from the instant intracircuit inconsistency, and despite the panel's discretionary power to *sua sponte* refer the matter to the entire court, the panel chose instead to deny Petitioner the opportunity to obtain relief from its ruling. Clearly, the uneasiness expressed by Justice Frankfurter in *Western Pacific*, in allowing the original panel the power to finally decide whether *in banc* consideration will be permitted, has been justified by the instant circumstances.

If the original merits panel that affirmed the trial court herein insists upon denying Petitioner the opportunity to revive his case based upon the significant change in circumstances which took place following expiration of the applicable appeals period, he should, at the very least, be entitled to an opportunity to **suggest** to

the circuit court as a whole that appropriate circumstances warranting court *in banc* consideration exist. It is not Petitioner's assertion that he is *per se* entitled to *in banc* consideration. Rather, litigants such as petitioner must be provided the procedural opportunity to **suggest** that the circumstances of a particular situation warrant such consideration. The circuit court panel's denial of Petitioner's right to **suggest** *in banc* consideration constitutes a denial of due process.

II. THE THIRD CIRCUIT COURT PANEL'S DENIAL OF PETITIONER'S REQUESTS TO RECALL THE MANDATE AND EXTEND TIME TO PETITION FOR REHEARING WAS AN ABUSE OF JUDICIAL DISCRETION WHICH RESULTED IN A DENIAL OF DUE PROCESS

The Third Circuit Court panel's refusal to recall its unjust mandate and/or provide Petitioner with an extension of time to petition for rehearing deprived Petitioner of his constitutionally protected right of access to the courts and has resulted in a violation of his due process rights. In the face of clear precedent permitting the circuit court to recall its mandate and/or to extend the time period within which an application for rehearing would be accepted, and in view of the original panel decision's clear conflict with the decision rendered in *Dillinger* by another panel (which decision was denied rehearing *in banc* by a majority of the active Third Circuit Court judges), the instant circuit court panel refused Petitioner even a modicum of the fundamental fairness essential to right of meaningful access to the courts as elaborated in Section I of this Petition.

A. Rehearing.

Proof that certain circumstances warrant untimely rehearing is supplied by this Court. Specifically, this Court has exercised jurisdiction in cases where parties have filed untimely petitions for certiorari holding that

the time requirements imposed by rules for filing are not jurisdictional and may be waived by the Court. *See, e.g., Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970). In the *Schact* case, the Court held:

> . . . . The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require. This discretion has been expressly declared in several opinions of the Court. *See Taglianetti v. United States*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed. 302, n. 1 (1969); *Heflin v. United States*, 358 U.S. 415, 418, 79 S.Ct. 451, 453, 3 L.Ed.2d 407, n. 7 (1959). *See also*, R. Stern & E. Gressman, *Supreme Court Practice*, 242-244 (4th ed. 1969), and the cases cited therein.
>
> * * * *

Schacht, supra, 90 S.Ct. at 1559. In discussing the grant of the untimely petition for certiorari, the Court held:

> When the petition for certiorari was filed in this case it was accompanied by a motion, supported by affidavits, asking that we grant certiorari despite the fact that the petition was filed 101 days after the appropriate period for filing the petition had expired. Affidavits filed with the motion, not denied or challenged by the Government present facts showing that petitioner had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control.

Schacht, supra, 90 S.Ct. at 1558 – 59.

Significantly, this Court has found that as a general principle "[i]t is always within the discretion of a court . . . to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it . . . ." *Schacht, supra*, 90 S.Ct. at 1562 (concurring opinion), *citing, American Farm Lines v. Black Ball*, 397 U.S. 532, 539, 90 S.Ct.

1288, 1292, 25 L.Ed.2d 547 (1970), *quoting*, *N.L.R.B. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953).

Likewise, Circuit Courts of Appeals have both the authority and the inherent power to grant an enlargement of time in accordance with Federal Rule of Appellate procedure 26(b) which provides in pertinent part:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time . . . .

More specifically, Rule 40(a) of the Federal Rules of Appellate Procedure provides in pertinent part:

> "A petition for rehearing may be filed within 14 days after entry of judgment *unless the time is shortened or enlarged by order*. . . ."
> [Emphasis added].

Rule 40(a) envisions that a petition for rehearing may be granted if it is demonstrated that the ". . . court has overlooked or misapprehended" points of law or fact. Thus, even when a petition for rehearing – like the instant petition – is filed after the Rule 40 time period has expired, this Court may still entertain the Petition. *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427, 429 (2nd Cir. 1970), *cert. den.*, 400 U.S. 829 (petition for rehearing presented to the Court more than three months after the court ruled upon the substantive issues granted). The Third Circuit's unequivocal holding in *Dillinger* clearly demonstrates that the panel of this Court which reviewed Kolbeck's contentions must have either overlooked or misapprehended the arguments plaintiff raised regarding the trial Court's ruling on the seat belt defense. Consequently, "good cause" was demonstrated in support of the requested

rehearing which should have been granted in the interest of justice. The circuit court's refusal to grant rehearing has denied Petitioner of his constitutionally protected right of meaningful access to the courts.

B. Recall.

The Third Circuit's power to recall its mandate is well established at common law and, this Court has both recognized and exercised such power. In the case of *Cahill v. New York, New Haven & Hartford Railway Company*, 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075 (1956), this Court granted a motion to recall and amend a judgement despite the denial of a petition for rehearing, denial of a stay of execution in the Court of Appeals and a satisfaction of the Court's original judgment. *Cahill*, *supra*, 76 S.Ct. at 759. The Court granted the motion for recall and stated, "We deem our original order erroneous and recall it **in the interest of fairness**." *Id.*

In *Cahill*, the District Court which had tried the case admitted evidence of prior accidents. The Second Circuit Court of Appeals reversed the trial court and following the grant of certiorari, this Court reversed the judgment of the circuit court. Thereafter, the defendant filed a petition for rehearing that was denied by this Court. In spite of a Supreme Court Rule which prohibited consecutive and out-of-time petitions for rehearing, the Court granted the respondent's motion to recall and amend the judgment. Furthermore, following this Court's original denial of the motion for rehearing and the denial by the District Court of a stay of execution, the defendant satisfied the money judgment that had been rendered against it. The ultimate result of the Court's recall was a remand to the circuit court for further proceedings. *See also*, *Boudoin v. Lykes Brothers S.S. Co.*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354; *Modified*, 350 U.S. 811, 76 S.Ct. 38 (1955). Power to recall a court's mandate exists to protect the integrity of the court's own processes. *Briggs v. Pa. R. Co.*, 334 U.S.

304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), *citing*, *Hazel-Atlas Glass v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 1281, 88 L.Ed. 1596 (1948). In *Briggs*, this Court recognized the power of a circuit court to recall and amend its mandate for purposes of adding interest to a money judgment. *Briggs*, *supra*, 68 S.Ct. at 1042.

Circuit Courts of Appeals have the inherent power to recall their mandates. *See*, *e.g.*, *Nelson v. James*, 722 F.2d 207 (5th Cir. 1984), (citations omitted); *Ravancho v. I.N.S.*, 658 F.2d 169 (3rd Cir. 1981); *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979), *reh'g den.*, *cert. den.*, 445 U.S. 943; *American Iron & Steel Institute v. E.P.A.*, 560 F.2d 589 (3rd Cir. 1977), *cert. den.* 435 U.S. 914 (AISI II); *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672 (9th Cir. 1973); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973); *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971), *cert. den.*, 406 U.S. 950; *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427 (2nd Cir. 1970); *Gradsky v. U.S.*, 376 F.2d 993 (5th Cir. 1967), *cert. den.*, 389 U.S. 908, *reh'g. den.*, 389 U.S. 998. While a court's power to recall and reform a mandate even after issuance is not specifically provided for in the rules, the power is well established, and no motion is required for the court to hear or rehear a cause *en banc*. *See*, *Sparks v. Duval County Ranch Co., Inc.*, *supra*. Although the issuance of a mandate ordinarily means that litigation has come to an end, a circuit court may, however, recall its mandate to prevent injustice; *see*, *Gradsky v. U.S.*, *supra*; or to protect the integrity of its own processes. *See*, *Perkins v. Standard Oil Co. of California*, *supra*, *citing*, *Briggs v. Pa. R. Co.*, *supra*, 334 U.S. at 304 (other citations omitted).

Significantly, a legitimate basis for granting a recall exists where doing so would avoid an injustice resulting from an intracircuit conflict. *Greater Boston Television Corp. v. F.C.C.*, *supra*, 463 F.2d at 279. Furthermore, the right of a Circuit Court to grant a recall of its

mandate following expiration of the ordinary appeals period has been recognized in cases where a subsequent state court decision directly contradicted the previous circuit court opinion, *Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015 (1944); *Braniff*, *supra*; in situations where a supervening United States Supreme Court decision is contrary to the prior circuit court holding, *Ravancho v. I.N.S.*, *supra*; *American Iron & Steel Institute v. E.P.A.*, *supra*; and, the fact that other circuit courts have consistently ruled in contrary fashion may be considered a factor in determining whether a recall petition should be granted, *AISI II*, *supra* 560 F.2d at 597. Thus, the Third Circuit Court had the power to recall its mandate in order to resolve the blatantly conflicting rulings between the two merits panels at issue.

Further justification for recall of the Third Circuit's mandate is premised upon the principle that circuit courts can and should treat petitions for rehearing as petitions to recall mandates. *See*, *e.g.*, *Ravancho v. I.N.S.*, *supra* 658 F.2d at 170; *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986); *See also*, *A to Z Portion Meats, Inc. v. N.L.R.B.*, 643 F.2d 390, 392 (6th Cir. 1980) (petition for clarification treated as petition to recall mandate). The Third Circuit Court has acknowledged its authority to correct an erroneous decision which is unfair and unjust by recalling its own mandate following expiration of the applicable time period for rehearing. *AISI II*, *supra* at 594 (citations omitted). In fact, the Third Circuit's opinion in *AISI II* confirming a court's authority to recall a mandate has been relied upon by at least four other Circuit Courts of Appeal as well as itself in *Ravancho v. I.N.S.*, 658 F.2d 169, 170 (3rd Cir. 1981) (court's original Mandate recalled in the context of a rehearing). *See also*, *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987); *Friedman v. Village of Skokie*, 763 F.2d 236, 237 (7th Cir. 1985); *Nelson v. James*, 722 F.2d 207, 208

(5th Cir. 1984); *A to Z Portion Meats, Inc. v. N.L.R.B*, 643 F.2d 390, 392 (6th Cir. 1981).

The Third Circuit's decision in *AISI II* is of particular relevance herein. The court, recalling a mandate that had been in place for over a year, based its recall upon a contradiction between its original holding in *American Iron & Steel Institute v. E.P.A*, 526 F.2d 1027 (3rd Cir. 1975)(AISI I) and a subsequent decision rendered by the Supreme Court in the case of *E.I. duPont de Nemours and Co. v. Train*, 430 U.S. 112, 97 S.Ct. 965 (1977). In *AISI II*, the court acknowledged the statutory[1] and common law [2] power of circuit courts to recall their own mandates. *AISI II*, *supra* at 593-94. As noted by the court:

> . . . recall may be warranted for "good cause," to "prevent injustice," or in "special circumstances."

AISI II, *supra* at 594 (citations omitted). The standards relied upon by the court to determine whether a recall was warranted in *AISI II* included situations:

> (1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is danger of incongruent results in cases pending at the same time . . . .

AISI II, *supra*, at 594 *citing*, *Greater Boston*, *supra*, at 278-79 (D.C. Cir. 1971). Significantly, the court also recognized an implicit basis for issuing a recall where a subsequent Supreme Court decision showed that the original decision was "demonstrably wrong." *AISI II*, *supra* at 594. Although no Supreme Court decision is involved herein, the Third Circuit's nearly simultaneous and completely contrary decision in *Dillinger* presents a

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1. 28 U.S.C. §2106.

2. *See, Reserve Mining Co. v. Lord,* 529 F.2d 184, 188 (8th Cir. 1976); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973); *Perkins v. Standard Oil Co. of Calif.*, 487 F.2d 672, 674 (9th Cir. 1973).

compelling basis for a recall as the court's affirmance in *Kolbeck* was "demonstrably wrong."

Instantly, Petitioner submits that there was ample "good cause" to grant his petition below and that failure to do so was an abuse of the circuit court's discretion. Petitioner *repeatedly* contended that it was error to allow defendant General Motors to offer evidence of seat belt non-use in defense of his defect claims. Despite Petitioner's legal opposition, the trial court erroneously permitted this evidence to be considered by the jury. The jury *found* the product defective, but ruled against Petitioner on the issue of proximate cause; the jury *found* Petitioner (and the driver running the red light) to be responsible for Petitioner's injuries. The only basis upon which the jury could have attributed causative fault to Petitioner – who was a passenger in a car travelling through an intersection on a green light – would have been for his failure to wear his seat belt. Clearly, therefore, the allowance of this defense was material to the verdict for Respondent. The necessity to "right the wrong" committed by affirming the admission of evidence that Petitioner was not wearing his seat belt was best stated by Judge Greenberg:

> In our view, the district court in *Kolbeck* mistakenly relied on Pennsylvania appellate decisions in negligence rather than products liability actions. . . . Thus, as the court seemingly overlooked the fact that contributory negligence is not a defense in a products liability suit, *Kolbeck* is not persuasive authority on the seat belt issue.

Dillinger, *supra*, 959 F.2d at 439-40. [A-35]

III. CONCLUSION

It is respectfully submitted that the decisions of the Third Circuit Court refusing to consider Petitioner's suggestion for *in banc* consideration and denying Petitioner's request for recall and/or rehearing in light of the

circumstances discussed above, arose to the level of deprivations of Petitioner's constitutionally protected right of "meaningful" access to the courts. Pursuant to this Court's power of supervision and its inherent authority to redress violations of constitutionally protected rights, Petitioner respectfully requests that his Petition for Writ of Certiorari to the Third Circuit Court of Appeals be granted.

Respectfully submitted,

LARRY E. COBEN, ESQUIRE
DEAN I. ORLOFF, ESQUIRE
LITVIN, BLUMBERG, MATUSOW & YOUNG
Attorneys for Petitioner

Dated: July 17, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1316

MICHAEL J. KOLBECK,

Appellant

v.

GENERAL MOTORS CORPORATION, and
TAIT DESIGNS and MACHINE and
CHARLES N. TAIT

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-00714)
District Judge: Hon. Daniel H. Huyett, 3rd

Submitted Under Third Circuit Rule 12(6)
November 21, 1991

Before: MANSMANN, COWEN and
HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Each party to bear their own costs.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk
Nov. 27, 1991

Certified as a true copy and issued in lieu
of a formal mandate on December 19, 1991

Test: /s/ Sally Mrvos

Clerk, United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPELLEES
FOR THE THIRD CIRCUIT

No. 91-3308

ALVIN DILLINGER

Appellant

v.

CATERPILLAR, INC., a Delaware Corporation;
WHEELER MACHINERY COMPANY, INC.,
a Utah Corporation

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-455)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, *Circuit Judges*

The petition for rehearing filed by appellee in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Morton A. Greenberg
Circuit Judge

Dated: April 1, 1992

Received and filed

/s/ Sally Mrvos
Sally Mrvos

March 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1316

Re: MICHAEL J. KOLBECK, APPELLANT vs.
GENERAL MOTORS CORP.
Present: HIGGINBOTHAM, *Circuit Judge*

1. Appellant's Petition Requesting an Extension of Time For Appellant To File a Petition For Rehearing.

2. For your information: A Judgment Order was filed November 27, 1991 in this appeal. The Mandate issued on December 19, 1991 in this appeal.

3. Any Answer in response to the above motion due by March 23, 1992 has not been received.

/s/ Barbara Jacobson
Deputy Clerk –
Direct Dial 597-8465

ORDER

The foregoing Motion is granted. Petition must be filed with brief by April 10, 1992. This order is entered without prejudice for the panel to decide whether under the circumstances the petition is timely.

By the Court,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: APR 2 1992

March 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1316

Re: MICHAEL J. KOLBECK, APPELLANT vs.
GENERAL MOTORS CORP.

Present: MANSMANN, COWEN, and HIGGINBOTHAM, *Circuit Judges.*

1. Appellant's Petition Requesting an Extension of Time For Appellant To File a Petition For Rehearing.

2. For your information: A Judgment Order was filed November 27, 1991 in this appeal. The Mandate issued on December 19, 1991 in this appeal.

3. Any Answer in response to the above motion due by March 23, 1992 has not been received.

/s/ Barbara Jacobson
Deputy Clerk –
Direct Dial 597-8465

ORDER

Upon consideration by the panel of the Appellant's Petition Requesting an Extension of Time, it is hereby ordered that the Petition is denied.

/s/ Carol Los Mansmann
Circuit Judge

Dated: APR 20 1992

April 9, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1316

(E.D.PA Civil No. 88-00714)

Re: KOLBECK vs. GENERAL MOTORS CORP.
MICHAEL J. KOLBECK, *Appellant*
Present: MANSMANN, COWEN and HIGGINBOTHAM,
Circuit Judges.

1. Appellant's Petition To Recall The Mandate Issued By This Court.

2. For your information: A Judgment Order was filed November 27, 1991 in this appeal. This Court's Mandate issued December 19, 1992.

3. Pursuant to Michael D. Brophy, Esquire, counsel for General Motors, he intends to file an Answer to the above motion by April 10, 1992. Any Answer in response to the above motion will be forwarded to the Court on receipt of same.

/s/ Barbara Jacobson
Deputy Clerk –
Direct Dial 597-8465

ORDER

The foregoing Motion is denied.

By the Court,

/s/ Carol Los Mansmann
Circuit Judge

Dated APR 20 1992

RECEIVED APR 29 1992

OFFICE OF THE CLERK

SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

April 28, 1992

Larry E. Coben, Esq.
Dean I. Orloff, Esq.
Litvin Blumberg Matusow & Young
210 West Washington Square
5th. Floor
Phila., PA 19106

Re: KOLBECK vs. GENERAL MOTORS CORP.,
MICHAEL KOLBECK, *Appellant*

No. 91-1316

Dear Mr. Coben:

This will acknowledge receipt on April 27, 1992 of "Appellant's Petition For Rehearing In Banc" which was submitted by you on behalf of Michael Kolbeck in the above-entitled case.

Appellant's "Petition For Rehearing In Banc" submission may be considered, if at all, as a motion for reconsideration of the panel's decision denying an extension of time to file a petition for rehearing. The motion will be referred to the Court In Banc only if so

referred by the three judge panel. *See generally* Third Circuit Internal Operating Procedures Chapter 10.3.3.

Very truly yours,
Sally Mrvos, Clerk

By: /s/ Kathleen Grady

Kathleen Grady
Supervisor
Direct Dial 597-8465

bj
cc: (E.A. Gray, Esq.
(T.J. Finarelli, Esq.
(M.D. Brophy, Esq.

May 7, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1316

Re: KOLBECK vs GENERAL MOTORS CORP.
MICHAEL KOLBECK, *Appellant*

Present: MANSMANN, COWEN and HIGGINBOTHAM,
Circuit Judges

1. Appellant's Petition For Rehearing In Banc, treated as a motion for Reconsideration of panel's Order denying an extension of time to file a petition for rehearing filed on April 20, 1992.

2. For your information: A Judgment Order was filed November 27, 1991 in this appeal, and the Mandate issued on December 19, 1991. An Order was filed on April 20, 1992 denying appellant's motion to recall the mandate. A copy of the Clerk's letter to Mr. Larry Coben, dated April 28, 1992 is enclosed for your information.

3. Memorandum of Law of Appellee, General Motors Corp., In Opposition To Appellant's Petition to Recall the Mandate, together with copy of letter dated May 7, 1992 from General Motors Corporation.

/s/ Barbara Jacobson
Deputy Clerk –
Direct Dial 597-8465

ORDER

The foregoing Motion is denied.

By the Court,

/s/ Carol Los Mansmann
Circuit Judge

Dated: JUN 11 1992

Michael J. KOLBECK, Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Tait Design and Machine, and
Charles N. Tait, Defendants.

Civ. A. No. 88-0714.

United States District Court,
E.D. Pennsylvania.

Aug. 6, 1990.

Automobile accident victim brought products liability action against automobile manufacturer, alleging that rearview mirror attachment/assembly system was defectively and carelessly designed and/or installed. On manufacturer's motion in limine seeking to permit introduction of evidence, the District Court, Huyett, J., held that: (1) Pennsylvania statute prohibiting introduction of nonuse of seat belt as defense in civil action was not retroactively applicable, and (2) under Pennsylvania law in effect at time of automobile accident, prior to enactment of Occupant Protection Act, automobile manufacturer would be allowed to introduce evidence of victim's nonuse of his seat belt.

Motion granted.

1. Federal Courts 383, 390, 391

When federal court sitting in diversity is presented with novel issue of law and applicable state precedent is absent, court must predict how highest court of state would resolve issue; in so doing, court may examine all existing resources, including restatements, law reviews and well-reasoned authority from other jurisdictions, and due regard, but not conclusive effect, should be given to decisional law of lower state courts.

2. Constitutional Law 188

"Retroactive law" is one that relates back to previous transaction to give legal effect different from that which it had under law in effect at time.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law 190, 191

Retroactive application of statute is supported when statute does not impair contract or disturb vested right, but only varies remedies, cures defects in proceedings otherwise fair, and does not vary existing obligations; whether vested rights are affected is not sole criterion for determining whether particular statute should be given retroactive application.

4. Automobiles 6
Products Liability 2

Pennsylvania statute prohibiting introduction of nonuse of seat belt as defense to civil action was not retroactively applicable. 75 Pa.C.S.A. § 4581(e).

5. Products Liability 40, 81.5

Under Pennsylvania law in effect at time of automobile accident, prior to enactment of Occupant Protection Act, defendant automobile manufacturer would be allowed to introduce evidence of injured passenger's nonuse of his seat belt in products liability action arising from allegedly defective rearview mirror attachment/assembly system; evidence was relevant to issues of liability and damages.

Larry E. Coben, Philadelphia, Pa., for plaintiff.

Edward A. Gray, Donald Camhi, Philadelphia, Pa., George J. Lavin, Jr. & Associates, Stephen J. Brogan, Jones, Day, Reavis and Pogue, Washington, D.C., for defendants.

MEMORANDUM

HUYETT, District Judge.

In this products liability action, defendant General Motors Corporation ("General Motors") wishes to resurrect what has been a closed issue for nearly three years under Pennsylvania law. General Motors has filed a motion in limine seeking to permit the introduction of evidence at trial of plaintiff Michael J. Kolbeck's ("Kolbeck") non-use of his seat belt at the time of the accident. On June 26, 1990, I granted General Motors' motion. I write now to explain my reasons.

I.

In the early morning of October 25, 1985, Kolbeck was a passenger in the right front seat of 1980 Pontiac Grand Prix operated by Conrad Keesey. While Keesey attempted to execute a left hand turn onto Fruitville Pike from the Route 30 exit ramp in Manheim Township, Pennsylvania, his vehicle was struck on the left front by another vehicle operated by Charles Tait.[1] Tait drove through a red light prior to the accident.

Thrown forward and to the left by the impact, Kolbeck's head struck the rearview mirror. The rearview mirror broke off leaving a metal stem with a rigid, jagged edge. Kolbeck suffered a small laceration and puncture wound of the left temple. According to Kolbeck's experts, the impact caused his head to stop abruptly and a mechanical distortion of his spinal cord. Consequently, Kolbeck has been a quadriplegic since the date of the accident. Neither Kolbeck or Keesey were wearing their seat belts at the time of the accident.[2]

Kolbeck alleges that "[t]he rear view mirror attachment/assembly system was defectively and carelessly

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1. Charles Tait and Tait Design and Machine were formerly defendants in this action. However, the claims against them have been settled.

2. Keesey suffered only minor injuries to his hip.

designed and/or installed." *See* Final Pretrial Order approved by the Court on June 6, 1990 at 3.[3] General Motors argues that evidence of non-use of seat belts is admissible because: (1) the statutory prohibition against the admission of the non-use of a seat belt can not be applied retroactively to this accident and that Pennsylvania law at the time of this accident permitted such evidence; (2) in a "crashworthiness" case, the manufacturer must be permitted to show non-use of a seat belt because the seat belt is a part of the crashworthiness design of the vehicle; (3) the non-use of a seat belt is relevant to issues of comparative negligence and enhancement of injuries when assessing damages; and (4) a prohibition of this type violates the equal protection and due process clauses of the fourteenth amendment.

II.

Before addressing the merits of General Motor's first argument, I must outline the state court decisions concerning the question of whether a "seat belt defense" exists under Pennsylvania law and the history of the Occupant Protection Act, 75 Pa. C.S.A. §§ 4581-85.

In 1979, the Superior Court of Pennsylvania first grappled with the issue in *Parise v. Fehnel,* 267 Pa.Super. 79, 406 A.2d 345 (1979). In *Parise,* the plaintiff was injured, as a result of a motor vehicle collision, when she was thrown forward causing her chest to hit the steering wheel and her legs to hit the dashboard. She was not wearing a seat belt at the time of the accident. The trial court denied the defendant's request for a jury instruction which advised the jury that it could consider the non-use of the seat belt in determining the amount of damages to award to plaintiff. The trial court's decision was based upon the absence of medical or other evidence from which the jury could

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3. The final pretrial order, once approved by the Court, supersedes all pleadings and governs the trial of the case. *See* Local Rule of Civil Procedure 21(d)(2)(a).

determine to what extent the plaintiff's injuries would have been lessened if she wore a seat belt. The appellate court affirmed, stating that "to have granted [the defendant's] requested point for charge would have been an invitation to the jury to engage in 'pure speculation on a very material point.' " *Id.* at 81, 406 A.2d at 346.

Notwithstanding this conclusion, the *Parise* court cautioned that "[o]ur decision today should not be seen as foreclosing the possibility of a so-called 'seat belt defense' in future cases. There is a split of authority as to the seat belt defense." *Id.* at 82, 406 A.2d at 347. Finally, the court took the position that the seat belt defense *might* be allowed if the defendant "introduced expert testimony showing a relationship between the plaintiff's injuries and his failure to use seat belts." *Id.*

On November 1, 1983, the Pennsylvania legislature enacted the Child Passenger Protection Act, *see* 1983 Pa. Laws 195, No. 53, which was to *take effect immediately*. The Child Passenger Protection Act required that all children under the age of four be fastened "securely in a child passenger restraint system" by a parent or legal guardian. *See* 75 Pa. C.S.A. § 4581(a). The Act further provided as follows:

> In no event shall a violation or alleged violation of this subchapter be used as evidence in a trial of any civil action; nor shall any jury in any civil action be instructed that any conduct did constitute or could be interpreted by them to constitute a violation of this subchapter, nor shall failure to use a child passenger restraint system be considered as contributory negligence nor shall failure to use such a system be admissible as evidence in the trial of any civil action. . . .

75 Pa.C.S.A. § 4581(e).

In a slightly different context, the Pennsylvania Superior Court revisited this issue in 1986. *See McKee v. Southeast Delco School Dist.*, 354 Pa.Super. 433, 512 A.2d 28 (1986), *appeal den.*, 514 Pa. 631, 522 A.2d 559

(1987). In *McKee,* a six year old child was injured when she fell from her seat while riding as a passenger on a school van. The child, not wearing a seat belt, fell after the school van stopped abruptly to avoid a collision. The trial court granted the plaintiff's motion for a new trial because it concluded that the exclusion of evidence of non-use of seat belts to restrain the child was error. The appellate court affirmed, concluding as follows:

> Under the facts of the instant case, a jury could have found that the operator of the school van had a duty to restrain Cheryl and other children in the van by using available seat belts. . . . [T]he school district instructed the [bus company] that children riding in its vans were to be restrained by seat belts. . . . [The bus company] caused instructions to be given to its drivers that seat belts were to be utilized. . . . A failure to restrain the children who were passengers in the school van, therefore, could have been found by the jury to be a breach of the operator's duty to exercise care to protect the children from injury. We agree with the trial judge that it was error to disallow evidence of this very significant circumstance.

Id. 354 Pa.Super. at 436-37, 512 A.2d at 29.[4]

On November 23, 1987, the Pennsylvania legislature modified the Child Passenger Protection Act by enactment of the Occupant Protection Act. *See* 1987 Pa.Laws 399, No. 82. Like the Child Passenger Protection Act, the Occupant Protection Act was to *take effect immediately.* Pertinent portions of the Occupant Protection Act provide as follows:

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4. Later, the court emphasized that, because there was no collision, the plaintiff's contention was that the failure to use restraints did not exacerbate the injuries but caused them entirely. *Id.* 354 Pa.Super. at 437, 512 A.2d. at 30. It is also important to note that the Child Protection Act did not apply.

(a) Occupant protection.—

* * * * * * *

(2) Except for children under four years of age and except as provided in paragraph (1), each driver and front seat occupant of a passenger car . . . shall wear a properly adjusted and fastened safety belt system. . . .

* * * * * * *

(e) Civil actions.—In no event shall a violation or alleged violation of this subchapter be used as evidence in a trial of any civil action; nor shall any jury in a civil action be instructed that any conduct did constitute or could be interpreted by them to constitute a violation of this subchapter; nor shall failure to use a child passenger restraint system or safety belt system be considered as contributory negligence no shall failure to use such a system be admissible as evidence in the trial of any civil action. . . .

75 Pa.C.S.A. § 4581(a)(2), (e).

As stated above, the accident in this case occurred on October 25, 1985 prior to the enactment of the Occupant Protection Act. Two opinions of the Pennsylvania Superior Court impact upon the question of whether 75 Pa.C.S.A. § 4581(e) should apply to this case. First, in *Grim v. Betz,* 372 Pa.Super. 614, 539 A.2d 1365 (1988), the court was faced with a similar situation. The motor vehicle accident in question occurred prior to the amendments to 75 Pa.C.S.A. § 4581 on May 26, 1983. The accident involved a collision which resulted in the injury of Gloria Grim and her sister-in-law, the driver and front passenger respectively, and three children above the age of four occupying the rear seat. Neither Gloria Grim or her sister-in-law were wearing a seat belt. Also, in the back seat was Gloria's three year old son, without any restraining device, who died as a result of the collision.

Suit was filed on or about July 25, 1984. Later, in late 1985 or early 1986, the defendants filed a motion to amend their answers to assert the seat belt defense. The trial court denied this motion. Defendants appealed. While the appeal was pending, the legislature enacted the Occupant Protection Act.

Thereafter, the Superior Court *en banc* affirmed on April 4, 1988. In so doing, the court explained:

> As such, it would appear that [defendants] are substantially correct in their assertions that the trial court's decision to preclude amendment to plead a "seat belt defense", as contrary to law, was erroneous on the basis of the state of the law on [the date of its decision].
>
> However, a reviewing court may affirm the decision of the trial court if the result is correct on any ground, without regard to the grounds relied upon by the trial court. Moreover it is well settled that an intervening change in the law must be applied to cases which are in the throes of direct appeal when the change occurs. We find that an intervening change in the law has occurred which mandates affirmance of the trial court's denial of permission to amend.
>
> On November 23, 1987, the availability of a "seat belt defense" in Pennsylvania, ceased to be an open question, with the passage of [the Occupant Protection Act]. . . .
>
> * * * * * * *
>
> The import of the amendments is clear: the legislature has decided that a defense of comparative negligence, in the form of a "seat belt defense", premised on either the failure of an adult to employ a seat belt for his own protection, or on failure of an adult to protect his minor child with seat belts, will not be available in any civil action in this Commonwealth.

Id. at 622, 539 A.2d at 1368-69 (footnote omitted; citation omitted). Finally, the court stated that the amendments were now controlling law, because they were to take effect immediately upon passage of the Act.[5] *Id.* The *Grim* court never explicitly discussed principles or retroactivity.

By a vote of two to one, the court in *Stouffer v. Pennsylvania Dep't of Transportation,* 127 Pa.Commw. 610, 562 A.2d 922 (1989) reached a different conclusion. First, relying upon *Parise, McKee,* and *Grim,* the majority concluded that at the time of the accident, January 18, 1985, Pennsylvania law permitted the seat belt defense. *Id.* 127 Pa.Cmwlth. at 612-15, 562 A.2d at 923-24. Next, the majority concluded that the statutory bar of the Occupant Protection Act was a substantive change in the law which could not be applied retroactively. *Id.* 127 Pa.Cmwlth. at 613-17, 562 A.2d at 924-25.

In a dissent, Judge Palladino disagreed with both prongs of the majority's analysis. Initially, she argues that the majority's reliance upon *McKee* is misplaced and that no common law duty to wear a seat belt has ever been recognized in the Commonwealth. And, second, she argues, relying on *Grim,* that the Occupant Protection act was a change in procedural law which should be applied to all causes of action which arose prior to its enactment but did not come to trial until afterwards. *Id.* 127 Pa.Cmwlth. at 615-18, 562 A.2d at 925-26.

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5. Importantly, this accident occurred over five months prior to the enactment of the Child Passenger Protection Act as well. Yet, relying on the initial version of 75 Pa.C.S.A. § 4581(e), the Superior Court determined that the trial court correctly concluded that "the state of the law at [the time of the trial court's decision] *did* preclude any attempt to plead Gloria Grim's negligence in failing to provide a seat belt or child restraint device to protect Robert Grim." *Id.* 372 Pa.Super. at 619-20, 539 A.2d at 1367-68 n. 6. Clearly, this amounts to judicial approval of the "retroactive" application of the statutory prohibition against evidence of the lack of a passive restraint system in any civil action.

III.

From this less than clear backdrop, I must resolve two issues. First, whether 75 Pa.C.S.A. § 4851(e) should apply to all causes of action which come to trial after its enactment even if the cause of action arose prior to the enactment. While Kolbeck argues that I should follow *Grim* and General Motors argues that I follow *Stouffer,* neither party addresses Pennsylvania law regarding the retroactive application of statutory provisions. And second, if I conclude that 75 Pa.C.S.A § 4851(e) does not control this case, I must determine whether Pennsylvania law permitted the seat belt defense at the time of this accident.

Neither question is a simple one. In respect to the former, I am faced with two seemingly contradicting intermediate appellate court opinions. As to the latter, if I need reach it, I must not only conclude how the Pennsylvania Supreme Court would decide an issue in the face of less than unequivocal appellate court opinions, but I must also determine the answer at a particular point in time without consideration of subsequent legislative events.

[1] Federal courts sitting in diversity must ascertain and apply state law. *See Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940); *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). When presented with a novel issue of law and applicable state precedent is absent, a federal court must predict how the highest court of the state would resolve the issue. *Prudential Property & Casualty Ins. Co. v. Pendleton,* 858 F.2d 930, 934 (3rd Cir. 1988). In so doing, a federal court may examine all existing resources, including Restatements, law reviews and well-reasoned authority from other jurisdictions. *Kohr v. Raybestos-Manhattan, Inc.,* 522 F.Supp. 1070, 1074 (E.D. Pa.1981).

Since a federal case will often fall outside the scope of those precise issues to which the state's highest court

has spoken, due regard, but not conclusive effect, should be given to decisional law of lower state courts. *Burke v. Maassen,* 904 F.2d 178, 182 (3d Cir.1990); *see also McKenna v. Ortho Pharmaceutical Corp.,* 622 F.2d 657, 662 (3rd Cir.), *cert. denied,* 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 237 (1980); *Fickinger v. C.I. Planning Corp.,* 556 F.Supp. 434, 438 (E.D.Pa. 1982). In fact, the United States Supreme Court has stated:

> An intermediate appellate state court . . . is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West v. A.T. & T. Co., 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940) (quoted in *Commissioner v. Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967)); *see also Wisniewski v. Johns-Manville Corp.,* 759 F.2d 271, 273-74 (3d Cir.1985) ("Although lower state court decisions are not controlling on an issue on which the highest court of the state has not spoken, federal courts must attribute significant weight to these decisions in the absence of any indications that the highest state court would rule otherwise."); *Adams v. Cuyler,* 592 F.2d 720, 725 n. 5 (3d Cir.1979) ("Federal courts . . . may consider the pronouncements of state intermediate appellate courts as an indication of how the state's highest court would rule"), *aff'd,* 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981).

A. *Retroactivity.*[6]

[2] "No statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa.C.S.A. § 1926. This principle becomes

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6. For the purpose of discussion or retroactivity, I shall assume that Pennsylvania law permitted the use of a seat belt defense at the time of the accident in this case.

relevant only after it has been determined that a proposed operation of the statute would be retrospective. *Gehris v. Pennsylvania Dep't of Transportation,* 471 Pa. 210, 369 A.2d 1271, 1273 (1977). A statute does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. *Id.* (statute which permitted condemnee to recover limited appraisal expenses was not applied retroactively when condemnation occurred prior to enactment and expenses were incurred after enactment); *see also Creightan v. Pittsburgh,* 389 Pa. 569, 132 A.2d 867 (1957) (application of "Heart and Lung Act" to a fireman with tubercular condition prior to the enactment of the Act was not a retroactive application as fireman only received benefits from the date of enactment). In other words, a retroactive law is one that relates back to previous transaction to give a legal effect different from that which it has under the law in effect at the time. *See R & P Services, Inc. v. Pennsylvania Dep't of Revenue,* 116 Pa. Commw. 230, 541 A.2d. 432, 434 (1988); *Pennsylvania Dep't of Labor and Industry, Bureau of Employment Security v. Pennsylvania Engineering Corp.,* 54 Pa. Commw. 376, 421 A.2d 521, 523, (1980).

If I apply section 4581(e) to this action, then it would generate a different legal effect than the law in effect at the time, assuming that a seat belt defense was available at the time of the accident. Therefore, I must determine whether the General Assembly "clearly and manifestly" intended retroactive application of section 4581(e).

[3] It is well settled that "statutes, other than those affecting procedural matters, must be construed prospectively except where the legislative intent that they shall act retrospectively is so clear as to preclude all question as to the intention of the legislature." *Farmers National Bank & Trust Co. v. Berks County Real Estate Co.,* 333 Pa. 390, 5 A.2d 94, 95 (1939); *Costa v. Lair,*

241 Pa.Super. 517, 363 A.2d 1313, 1314 (1976). Retroactive application of a statute is supported when the statute does not impair a contract or disturb a vested right, but only varies remedies, cures defects in proceedings otherwise fair, and does not vary existing obligations. *Smith v. Fenner,* 399 Pa. 633, 161 A.2d 150, 154 (1960). Whether vested rights are affected is not the sole criterion for determining whether a particular statute should be given retroactive application. *Costa v. Lair,* 363 A.2d at 1315 n. 4.

[4] As stated by the majority in *Stouffer,* "a legislative determination that certain conduct cannot be considered in a negligence case is substantive not mere procedure." *Stouffer,* 562 A.2d at 925. This conclusion is supported by the decision of the Pennsylvania Superior Court in *Costa v. Lair.* The *Costa* court concluded that Pennsylvania's newly enacted comparative negligence statute could not be applied retroactively to causes of action which arose prior to its effective date. The court explained its ruling as follows:

> Prior to the effective date of the Act, a plaintiff was required to be free of any personal fault contributing to his injury in order to establish liability in a civil action for negligence. . . . Under the Act, however, a plaintiff whose negligence is less than that of the defendant is not precluded from recovery due to his contributory negligence, but is allowed recovery reduced by the proportion of his fault. Thus, if applied retroactively, the Act would create legal liability for damages which did not exist at the time the accident occurred.

Costa v. Lair, 363 A.2d at 1314-15 (footnote omitted). *See also Browne v. Wheel Horse Products, Inc.,* 408 F.Supp. 415 (E.D.Pa.1976) (amendment to Pennsylvania's workmen's compensation statute which barred the right of indemnification and contribution from the employer effected a change in the substantive rights of the litigants and would not be applied retroactively.)

Assuming that a seat belt defense did exist at the time of this accident, I conclude that application of section 4581(e) retroactively would alter the substantive rights of the litigants. Without a seat belt defense, the extent of General Motors' liability, if any, could be increased. Absent a clear intention by the legislature that section 4581(e) be applied retroactively, I shall not give it such an effect. Because the court in *Grim* did not address the retroactivity question, I cannot afford its decision which gave section 4581(e) retroactive effect much weight.

B *The Seat Belt defense under Pennsylvania law.*

[5] Ironically, because of the enactment of the Occupant Protection Act, the Pennsylvania Supreme Court may never speak to this issue. Nonetheless, based upon the existing intermediate appellate authority and the well-reasoned authority from other sources, I am persuaded that the Pennsylvania Supreme Court would have permitted the seat belt defense at the time of the accident in this case.

In 1979, nearly eleven years ago, in *dicta* the Pennsylvania Superior Court stated that it "might have allowed the defendant a seat belt defense if he had introduced expert testimony showing a relationship between the plaintiff's injuries and his failure to use seat belts." *Parise,* 406 A.2d at 347 (emphasis added). This *dicta* is firmly supported by two subsequent decisions which examine Pennsylvania law prior to the enactment of the Occupant Passenger Act.[7] First, while stating that

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7. Kolbeck correctly argues that the decision in *McKee* is not a "seat belt defense" case because contributory negligence was not an issue in the case. Therefore, reliance upon this case as authority for the proposition that a seat belt defense is available in Pennsylvania is misplaced. *McKee* merely concluded that, based upon the circumstances of the case, a bus company had a duty to secure its minor passenger with seat belts because the school district had so instructed the bus company. *See Stouffer,* 562 A.2d at 926 (Palladino, J. dissenting).

the availability of a seat belt defense in Pennsylvania at the time of the enactment of the Occupant Protection Act was an "open question," the court in *Grim*, relying on the *dicta* of *Parise,* concluded that the trial court's decision that the seat belt defense was unavailable was contrary to law as it existed on March 31, 1986. *Grim,* 539 A.2d at 1367-68. Second, the two judge majority of the *Stouffer* court stated "we believe that at the time of this accident the Stouffers had a duty to wear seat belts." *Stouffer,* 526 A.2d at 926.[8]

The seat belt defense has been widely litigated and the law on the admissibility of seat belt evidence is in a state of flux. Some courts considering this issue have held that the non-use of available seat belts is not admissible for the purpose of demonstrating contributory negligence or for the purpose of mitigating damages. *See* Annotation, Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence, 92 A.L.R.3d 9 (1979); Annotation, Nonuse of Seat Belt as Failure to Mitigate Damages, 80 A.L.R.3d 1033 (1977). Others have disallowed the evidence for the issue of liability, while permitting it for diminution of damages. Some jurisdictions have concluded that a person does not have an affirmative duty to wear a seat belt absent a statutory mandate. *See, e.g., Clarkson v. Wright,* 108 Ill.2d 129, 90 Ill.Dec. 950, 483 N.E.2d 268, 270 (1985) ("there was no statutory duty to wear a seat belt and the presence of the seat belt in the automobile did not create the duty").

Recently, state legislatures have also taken an interest in this issue. Since 1984, more than 25 other states and the District of Columbia have adopted some form of mandatory seat belt law. *See Waterson v. General Motors Corp.,* 111 N.J. 238, 544 A.2d 357, 368 n. 4 (1988). As summarized by the New Jersey Supreme Court in *Waterson*, some states' legislatures, like Pennsylvania's legislature, have rejected the admissibility of the seat

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8. While the majority's reliance upon *McKee* might have been misplaced, it also relied upon *Parise* and *Grim.*

belt defense. Others, like New Jersey, have left the status of the defense to their courts. Still other states have permitted the defense but substantially restricted the percentage of fault which a jury could attribute to non-use of a seat belt. *Id.*

In my opinion, faced with this issue in 1985, the Supreme Court of Pennsylvania would have adopted the *dicta* of *Parise* which was followed in *Grim* and *Stouffer*. I cannot ignore the decisions of these intermediate appellate courts. This conclusion is supported by well-reasoned authority from other jurisdictions. *See, e.g., Melia v Ford Motor Co.,* 534 F.2d 795, 799-801 (8th Cir. 1976) (applying Nebraska law—the defective crashworthiness design theory of liability requires that the vehicle be considered as a whole and that the manufacturer be held liable for the damages caused by design defects but not for damages arising from other causes); *LaHue v. General Motors Corp.,* 716 F.Supp. 407, 416-19 (W.D.Mo.1989) (applying Missouri law—same); *Jordan v. General Motors Corp.,* 624 F.Supp. 72, 75-76 (E.D.La. 1985) (applying Louisiana law—same); *Wilson v. Volkswagen of America, Inc.,* 445 F.Supp. 1368, 1371-73 (E.D.Va. 1978) (applying Virginia law—same).

For the reasons stated above, I conclude that the Pennsylvania Supreme Court would have recognized the availability of the seat belt defense in 1985, and I will permit it in both phases of the trial as such evidence is relevant to issues of liability and damages.[9] Of course, plaintiff shall be permitted to introduce evidence which demonstrates a defect in the seat belt systems or tends to show that his injuries would have occurred, to the same or a lesser degree of severity, even if he were wearing the available seat belt.

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9. I note that prior to the enactment of the Occupant Protection Act, I permitted the introduction of evidence of non-use of an available seat belt by the plaintiff. *See Hanninen v. Toyota Motor Corp.,* Civil Action No. 84-6013 (strict liability action); *Jabbour v. Shestak,* Civil Action No. 85-6459 (automobile negligence action).

IV.

For the reasons stated above, I shall grant General Motors' motion in limine, and permit the introduction of evidence of Kolbeck's non-use of his seat belt in this action on the issues of liability and damages.

Alvin DILLINGER, Appellant

v.

CATERPILLAR, INC., a Delaware Corporation; Wheeler Machinery Company, Inc., a Utah Corporation

No. 91-3308.

United States Court of Appeals,
Third Circuit.

Argued Dec. 12, 1991.

Decided Feb. 25, 1992.

Rehearing Denied April 1, 1992.

Truck driver brought products liability action against manufacturer of truck. The United States District Court for the Western District of Pennsylvania, Alan N. Bloch, J., entered judgment on jury verdict in favor of manufacturer, and driver appealed. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) evidence of driver's nonuse of seat belts was not admissible, and (2) evidence of driver's failure to use alternative braking systems when primary brakes failed was not admissible as evidence of contributory negligence.

Reversed and remanded.

Circuit Judge Becker's disagreement in part was noted in the opinion.

Alito, Circuit Judge, filed a dissenting opinion.

1. Federal Courts 416

In diversity action, Pennsylvania law governed admissibility of evidence that plaintiff had not used seat belt.

2. Federal Courts 383

In deciding diversity case, Court of Appeals must give due consideration to de-

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ty, at least under Pennsylvania law, is to shift the loss to the party who can most easily bear it. *Staymates v. ITT Holub Industries,* 364 Pa.Super. 37, 43-44, 527 A.2d 140, 143 (1987).

The Supreme Court's decisions protecting plaintiffs in strict products liability cases have been applied in the Superior Court as well, though as we shall demonstrate, not always faithfully. In *Staymates,* the Superior Court confirmed that the Supreme Court's decisions "provide[ ] a clear indication of the direction the Court was taking with respect to its product liability doctrine. At a minimum, the Court made apparent its firm belief that negligence concepts did not belong in product liability cases." 364 Pa.Super. at 44, 527 A.2d at 143. The court further held:

> We are quite aware that a number of states have taken the initiative, be it by judicial decision or legislative enactment, to apply comparative negligence principles to strict liability. However, in the absence of any indication from our Supreme Court that it is willing to alter its stance . . . favoring a retention of the dichotomy between strict liability and comparative negligence in the area of products liability, we find it inauspicious at this time to follow suit. . . .

364 Pa.Super. at 47, 527 A.2d at 145.

Accord, Harford Mutual Ins. Co. v. Moorhead, 396 Pa.Super. 234, 248-50, 578 A.2d 492, 500 (1990) (plaintiff's negligence is inadmissible in strict liability proceeding), *allocatur denied,* 590 A.2d 757 (1991); *Remy v. Michael D's Carpet Outlets,* 391 Pa.Super. 436, 444-46,

571 A.2d 446, 451 (1990) (plaintiff's *comparative* negligence is inadmissible in products liability suit, despite passage of Pennsylvania Comparative Negligence Act), *allocatur granted,* 527 Pa. 634, 592 A.2d 1301 (1991); *Carrecter v. Colson Equipment Co.,* 346 Pa.Super. 95, 99-101, 499 A.2d 326, 329 (1985) (negligence concepts have no place in strict liability action).

The federal courts construing Pennsylvania law have similarly recognized the Pennsylvania Supreme Court's refusal to consider the plaintiff's negligence in products liability proceedings. *See, e.g., Holloway v. J.B. Systems, Ltd.,* 609 F.2d 1069, 1073 (3d Cir. 1979) ("We read *Azzarello* as a signal that evidence and jury instructions regarding negligence concepts should be kept out of cases brought under § 402A.") (footnote omitted); *Conti v. Ford Motor Co.,* 578 F.Supp. 1429, 1434 (E.D.Pa.1983) ("The Pennsylvania Supreme Court, perhaps more than any other state appellate court in the nation, has been emphatic in divorcing negligence concepts from product-liability doctrine.") *rev'd on other grounds,* 743 F.2d 195 (3d Cir.1984), *cert. denied,* 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 784 (1985).

b. Seat Belt Cases

[3] In light of the Pennsylvania Supreme Court's steadfast unwillingness to permit the introduction of evidence concerning a plaintiff's contributory negligence in a products liability proceeding, several courts, including this court, have held that evidence of a plaintiff's non-use of a seat belt is inadmissible in such an action.

Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir.1977), was our first opportunity to address the propriety of the introduction of evidence concerning plaintiff's non-use of a seat belt under Pennsylvania law. There, the wife of a decedent brought a products liability action against a car manufacturer for the death of her husband in a one-vehicle accident. The case was bifurcated at trial between liability and damages and, at the

damage phase, the defendant sought to introduce evidence concerning the decedent's non-use of the available seat belt, arguing that such evidence was admissible under the doctrine of "avoidable consequences."[14] The district court excluded the evidence, holding that "evidence of nonuse was 'akin to a claim of contributory negligence, which is not a defense in a strict liability case.' " *Id.* at 764 (quoting the district court in *Vizzini,* 72 F.R.D. 132, 139 (E.D.Pa.1976)). The defendant appealed, claiming, *inter alia,* that this ruling was erroneous.

We affirmed the exclusion. First, we observed that:

> The rule of avoidable consequences is closely akin to the doctrine of contributory negligence. Both describe the legal implications of plaintiff's negligent acts. Both are based on the policy of conservation of resources. And '[b]oth rest upon the same fundamental policy of making recovery depend upon plaintiff's proper care for the protection of his own interests.'

Id. at 766 (quoting Prosser on Torts § 65 at 423). Although we recognized that the two doctrines differ in that contributory negligence is a complete bar to recovery while application of the rule of avoidable consequences will result in a reduction in recovery, we found that the concepts are similar in their focus on the plaintiff's negligence—either the negligence that caused the injury or negligence that aggravated the injury.

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14. Comment f to section 433A of the Restatement (Second) of Torts sets forth the rule of "avoidable consequences" that permits the apportionment of harm based on the plaintiff's negligence. Further, section 465, comment c provides "apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues." Thus, under the Restatement, the non-use of a seat belt would fall squarely within section 465 if not barred on some alternative basis.

We concluded that "[t]o extend the avoidable consequences rule to bar proportionate recovery for plaintiff's prior acts of negligence shifts the focus away from the question of plaintiff's aggravation of an existing injury to the question of plaintiff's contribution to the original cause of that injury. Thus, the inquiry becomes essentially one into the contributory negligence of the plaintiff." *Id.* at 766. Further, we stated that *McCown v. International Harvester Co.* constituted evidence that the Pennsylvania Supreme Court would reject evidence concerning the non-usage of a seat belt, both as to causation and to mitigation of damages. *Id.* at 767-68.

In *Davis v. Roosevelt Chrysler Plymouth, Inc.*, 5 Phila. 489, (C.P.Phila.County 1981), a common pleas court endorsed our approach in *Vizzini* and excluded evidence of the plaintiff's non-use of the seat belt both as to causation and to mitigation of damages. In *Davis,* the plaintiffs brought a products liability action under section 402A against the defendant car company, contending that the axle of the car severed suddenly, causing the plaintiff to lose control of the car and drive into a tree. When the car hit the tree, the plaintiffs suffered severe injuries. The plaintiffs were not wearing seat belts at the time of the accident, although the car was equipped with them.

The defendants sought to introduce evidence that the plaintiff's had not used the available seat belts, advancing the doctrine of "avoidable consequences" to reduce the plaintiffs' recovery by the amount of harm the plaintiffs could reasonably have avoided. According to the defendant, "occupants restrained, using the available lap belts and shoulder harnesses would not sustain the same injuries" as the plaintiffs did. *Id.* at 505. The court refused to admit the evidence, holding "[w]e are persuaded by the result in *Vizzini.*" *Id.* at 505.

At the outset, the court observed that, although the doctrine of "avoidable consequences" generally applies to a plaintiff's post-accident behavior, "we are not persuaded that the applicability of the doctrine . . . is

determined by a simplistic before or after accident test." *Id.* at 505-06 n. 58 (quoting *Vizzini v. Ford Motor Co.*, 569 F.2d at 770 (Weis, J., concurring and dissenting)). Second, the court assumed that the appropriate level of expert testimony establishing the causal relation between the plaintiffs' non-use of the seat belt and their damages had been established. Thus, the court did not face the difficult issue concerning the quantum of expert testimony required. *Id.* at 507 n. 59. Finally, like the *Vizzini* court, the court held that there is no meaningful distinction between the concepts of avoidable consequences and contributory negligence when, as here, the focus is on the plaintiffs' pre-accident conduct.

> [T]here is no principal [sic] difference between contributory negligence and avoidable consequences, at least, when the latter is cast in its pre-accident form. Contributory negligence focuses on the plaintiff's negligence before an accident occurs. Avoidable consequences, in its pre-accident form, likewise focuses on the negligence of the plaintiff before the accident.

Id. at 508. (footnote omitted).

The court concluded that permitting the introduction of the plaintiffs' non-use of the seat belts would be directly at odds with the Pennsylvania Supreme Court's dictates barring evidence of a plaintiff's negligence in products liability proceedings. *Id. See also Roundtree v. John B. White Ford, Inc.*, 2 Phila. 465, 480 (C.P.Phila.County 1979) ("plaintiff's failure to use her seat belt is not a defense in a strict products liability case under section 402A;" however, the court left open whether such evidence was admissible for mitigation of damages purposes), *aff'd in part and rev'd in part,* Nos. 526, 620, slip op. (Super.Ct. Feb. 19, 1982).

Notwithstanding the foregoing precedent, the district court in *Kolbeck v. General Motors Corp.*, 745 F.Supp. 288 (E.D. Pa. 1990), *aff'd,* 950 F.2d 722 (3d Cir.

1991) (table), reached the opposite conclusion. Kolbeck, a passenger in a Pontiac, brought an action against General Motors, the manufacturer of the Pontiac, alleging that the rearview mirror attachment "was defectively and carelessly designed and/or installed" and that this defect caused his injuries when his head struck the attachment after a collision between the Pontiac and another vehicle. General Motors moved, *in limine,* to introduce evidence of Kolbeck's non-use of the seat belt as a defense to liability and to mitigate damages.

Kolbeck urged that a Pennsylvania statute, the Occupant Protection Act, 75 Pa. Cons.Stat.Ann. §§ 4581-85 (Supp.1991), requiring the driver and front seat occupant of the vehicle to wear a seat belt but expressly prohibiting any alleged violation of the statute to be used as evidence in any civil action, should be applied to govern his case, although the accident took place before the statute was enacted.[15] *Id.* § 4581(e). The district court refused, noting that, because the statute "would alter the substantive rights of the litigants," the court required evidence that the General Assembly "clearly and manifestly" intended retroactive application of the statute. *Id.* at 294. There was no clear proof that the General Assembly had intended retroactive application. Further, the court concluded that, in its view, the Supreme Court would have admitted evidence

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15. The Occupant Protection Act was effective at the time Dillinger's accident but we do not decide the case under the act as it appears that the 773 was not a vehicle subject to the act. We acknowledge, however, that the act could be read to exclude the introduction of non-use of a seat belt even for a vehicle not covered by the act as it provides that "nor shall failure to use a . . . safety seat belt system be considered as contributory negligence nor shall failure to use such a system be admissible as evidence in the trial of any civil action." This proviso is not, at least by express terms, limited to vehicles covered by the act. Of course, if we are wrong and the act is applicable either because the act applies to the 773 or the proviso to any vehicle, then our result would not be changed. Furthermore, without being directly applicable, the act may be useful here as an indication of Pennsylvania public policy.

of a plaintiff's non-use of the seat belt prior to the enactment of the statute.

In our view, the district court in *Kolbeck* mistakenly relied on Pennsylvania appellate decisions in negligence rather than products liability actions. Indeed, the court in *Kolbeck* did not mention the distinction under Pennsylvania law between negligence and products liability suits and the permissible defenses in each type of action, even though it characterized the case as a "products liability" rather than negligence action. *Id.* at 289. Thus, as the court seemingly overlooked the fact that contributory negligence is not a defense in a products liability suit, *Kolbeck* is not persuasive authority on the seat belt issue.

[4, 5] In light of the foregoing decisions, and setting aside *Kolbeck* which we will not follow, we are satisfied that the district court in this case erred in admitting evidence of Dillinger's non-use of the seat belt, even for the limited purpose of mitigating damages. For this reason, it is unnecessary to assess the sufficiency of Dillinger's expert testimony concerning the injuries he would have avoided if he had worn a seat belt, because it was error to admit any evidence on this subject.[16] However, as we have already indicated, be-

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16. The Pennsylvania Supreme Court's decision in *Martin v. Owens-Corning Fiberglas Corp.*, 515 Pa. 377, 528 A.2d 947 (1987), does not alter this analysis. In *Martin*, an insulation worker who suffered asbestosis sued asbestos manufacturers for compensatory and punitive damages. A plurality of the Supreme Court held that section 433 of the Restatement (Second) of Torts, which permits the apportionment of harm to separate causes, applied to the case, but concluded that there was insufficient evidence to apportion damages between the worker's exposure to asbestos and emphysema resulting from cigarette smoking.

In our view *Martin* is inapplicable here. In *Martin* the evidence supported the conclusion that the plaintiff's own conduct completely unrelated to his exposure to asbestos contributed to his condition, though the extent of the contribution was a matter of speculation. On the other hand the harm caused by Dillinger's conduct in not using a seat belt was directly intertwined with the

cause the jury determined that Caterpillar's product was either not defective or that the defect was not a substantial factor in causing the accident, this error was harmless.[17]

NOTES *(Continued)*.

harm caused by Caterpillar's product in the sense that, without the accident caused by the defect, Dillinger's own conduct would have caused him no injury. Thus, apportionment here could only be for the purpose of negating a portion of the harm directly caused by the failure of the product. Certainly such an apportionment is not comparable to requiring a plaintiff to bear a loss which he would have suffered even if there had been no defect in the product and hence no accident.

17. Of course, it could be argued, as Dillinger did during oral argument before us, that the jury was influenced by the evidence concerning Dillinger's failure to use the available lap belt in determining whether Caterpillar's product was defective or whether a defect caused Dillinger's injuries. However, we must assume that the jury was competent to follow and did follow the instructions given. *City of Los Angeles v. Heller*, 475 U.S. 796, 798, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986).